IN THE

Supreme Court of the United States

October Term, 1947

No. 864 92

H. P. HOOD & SONS, INC.,

Petitioner,

v.

C. CHESTER DU MOND, Commissioner of Agriculture and Markets of the State of New York.

BRIEF FOR COMMISSIONER OF AGRICULTURE AND MARKETS IN OPPOSITION TO WRIT OF CERTIORARI

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Statement

The proceeding in the nature of certiorari was instituted pursuant to Article 78 of the New York Civil Practice Act to review an administrative determination of the Commissioner of Agriculture and Markets which (1) renewed petitioner's milk dealer license, and (2) denied its extension to permit the operation of a new milk plant at Greenwich, New York (R. 15, 21).

Opinions Below

The court of original jurisdiction was the Special Term of the New York Supreme Court which referred the pro-

ceeding to the Appellate Division for review and determination pursuant to the 6th and 7th subdivision of Civil Practice Act section 1296 (R. 4, 12). An unpublished opinion was written on a motion by the commissioner to strike from the petition certain language in the nature of mandamus (R. 424).

The Appellate Division handed down two concurring opinions unanimously confirming the commissioner's order (271 App. Div. 394; R. 135, 137).

The Court of Appeals' opinion is found in 297 N. Y. 209, 78 N. E. (2d) 476; (R. 148).

The Question

The commissioner acted under section 258-c of the New York Agriculture and Markets Law. Its opening paragraph is the pertinent one. It reads:

> "No license shall be granted to a person not now engaged in business as a milk dealer[4] except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest."

Notwithstanding the admission in petitioner's briefs below that no restrictions or conditions are imposed upon the license granted by the commissioner and despite the

[4] Not a prohibition. See Matter of *Elite Dairy Products* v. *Ten Eyck*, 274 N. Y. 188 at 193, 194.

fact that under its license petitioner operated three milk plants in New York (Exhibit 5, p. 2, R. 118; R. 38 fol. 113), it contended in the Court of Appeals that the commissioner's refusal *to extend its license* to permit the operation of a fourth plant constituted an embargo or prohibition against its interstate milk shipments to the violation of the Commerce Clause.

It is important to understand that no such contention was made or even suggested on the administrative hearing before the commissioner. Indeed, there was no constitutional question before the commissioner, and so the hearing record is absolutely barren of the necessary proof to support one. However, the Court of Appeals ruled that the mention of petitioner's argument in its Appellate Division brief made a constitutional point available to petitioner in that court, and granted leave to appeal from the unanimous order of the Appellate Division (R. 140).

Thus the constitutional question, if any, can only be whether the commissioner's denial of petitioner's application to extend its milk dealer license to authorize the operation of a milk plant at Greenwich, New York, contravenes the Commerce Clause of the Federal Constitution.

ARGUMENT

1. There is no constitutional question to be reviewed by this Court.

Like a complaint, the petition for review under Article 78 must frame the issue (New York Civil Practice Act section 1288). The Court of Appeals found that the constitutional point was not raised in the petition (R. 149).

Since the pleadings do not frame a constitutional issue, there is no allegation as to the nature or extent of the bur-

den or obstruction claimed to be imposed on petitioner's interstate shipments. There is no showing as to the proportionate relation petitioner's milk shipments bear to the total milk exported from New York State; and there is nothing as to the ratio between total export and total intrastate shipments. The New York Court of Appeals recognized this insufficiency and said in its opinion: "It may be remarked that there is here no showing as to how much New York milk is exported across the state line. Absent such a showing, we cannot tell what proportion such interstate shipments bear to the whole of the production as to which the state licensing statute operates" (R. 151). It has been said that constitutional questions are dealt with only as they are appropriately raised upon the record. (*Allen-Bradley Local* v. *Board*, 315 U. S. 740, 746).

The hearing record clearly shows that the parties to the administrative hearing did not comprehend the kind of proof which we say is material to a determination of the constitutional issues now raised by petitioner's specification of error because it goes directly to the question whether a burden, if existing, is incidental and therefore not forbidden or, on the other hand, is unreasonable and therefore prohibited. "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." (*Nippert* v. *Richmond*, 327 U. S. 416, 425).

The petition (p. 3) urges that the question is whether the commissioner's order denying a license to purchase and ship interstate obstructs interstate commerce. That seems to us to be a strained interpretation. The commissioner granted petitioner a license to deal in, purchase, handle, distribute and sell milk according to the intent expressed

by petitioner in its application (R. 33). We say there is no obstruction, and petitioner in its Appellate Division brief conceded the situation, saying:

> "No restrictions or conditions are imposed upon the license. The application upon which it was granted lists (Exhibit 5, fols. 352, 357), on page 2 thereof, the two plants already mentioned, operated by petitioner, and the plant at Norfolk, New York, also operated by petitioner, as the plants or stations owned or operated by it where it receives milk from producers. Petitioner has already enlarged the plant at Eagle Bridge (fol. 122) so that it has a contemplated capacity of 40,000 pounds to 60,000 pounds per hour, or approximately 500 cans (fol. 138) per hour. The producers at Eagle Bridge deliver between 1,000 and 2,000 cans of milk during the year (fol. 166), so it is apparent that the Eagle Bridge plant of petitioner could handle additional milk and it is reasonable to assume that the plant at Salem could do likewise. In any event, there is nothing to prevent the petitioner from enlarging its present plants and going out to seek as many producers as it needs to satisfy its requirements, without opening a plant at Greenwich." (Hood Appellate Division brief, p. 17).

Petitioner's argument in support of the Writ, at least from the character of its case citations, seems to ignore the fact that petitioner is licensed in New York; that it recently greatly enlarged with approval its Eagle Bridge plant; and that as appears in the quotation above there are no restrictions on its purchases of milk in New York.

The most that this record shows for petitioner is that during the peak or "flush" period it would be more convenient to direct some milk from Eagle Bridge and Salem to the new plant (R. 40). The peak period is not over six weeks (R. 46) and Exhibit 5 at page 4, item 24, shows the month of June as the month of maximum purchases (R. 118, R. 38, fol. 113). All milk plants whether they serve

Boston or New York operate under similar conditions and all milk plants must meet the same Board of Health requirements* (R. 47).

Thus, while petitioner's argument is one for convenience—a contention which will not usually support a constitutional claim—it entirely ignores its own proof on the administrative hearing that within thirty days from that time the Eagle Bridge plant would become a so-called new plant (R. 56) with greatly enlarged capacity up to 60,000 pounds per hour (R. 46. Compare with former 35,000 pounds per hour capacity. R. 49-50) together with storage tank capacity of 700 cans** which it did not have when it made application to extend its license (R. 49).

Petitioner urges a conflict between the state licensing law and federal authority in the form of federal order No. 4—the Boston Milk Marketing Order. The licensing of milk dealers in New York is predominantly, if not entirely, local. When in *Baldwin* v. *Seelig*, 294 U. S. 511, it was made apparent the states could not project their price regulations into other jurisdictions, the milk marketing economists looked to federal cooperation in the form of the Boston and New York milk marketing orders*** to accomplish producer price regularity when the milk is sold in these city outlets. That is as far as federal policy goes.

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* Under the health regulations, the producer cools his evening's milk. If he delivers his morning's milk before 9 A. M. he does not need to cool it, and the plant does. If he delivers after 9 A. M., he must then cool his morning's milk also (R. 49).

** In round numbers, 85 pounds to a can or 59,500 pounds.

*** The present and the earlier emergency law contain provision for interstate and federal-state control of the prices of milk handled in interstate commerce (Agriculture and Markets Law section 258-m). In both New York and Boston, the price is fixed to the producer only. See, also, separability clause of section 258-j.

By the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U. S. C. §§ 601 *et seq.* and the Boston Order the Federal Government did not take over milk dealer licensing from the states. The state stands alone in the licensing field. The Marketing Agreement Act and the Bosfor Order do not regulate the number of dealers in a market or the number of milk plants each dealer may operate. Order No. 4, the Boston Order, is not in this record. If it is to be noticed then it is pointed out that it relates to a "handler", as the dealer is called, only, if and when he purchases milk from producers who will ship to him in the administratively defined Boston Market and then only as to the *price* the dealer is required to pay his producers. In other words, it is price control. The state on this record does not regulate milk prices paid to or by anyone. The commissioner has not attempted nor suggested an attempt to interfere in any way with whatever price Hood pays New York producers.

Below we brought *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, to the attention of the Court of Appeals. (Compare with *Baldwin* v. *Seelig*, 294 U. S. 511, on which petitioner at bar relies and which is distinguished at pages 570-571 in *United States* v. *Rock Royal Co-Op.*, 307 U. S. 533). In the Eisenberg case the petition for the Writ of Certiorari states the question then presented as follows:

> "May a State statute regulating the milk industry *by requiring that all milk dealers obtain a license*, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying the milk at its plant within the State from farmers located therein for shipment to another State?" (italics supplied)

2. The Commissioner has not done and does not threaten to do anything to interfere with, embargo, or place an unconstitutional burden on petitioner's interstate milk shipments.

In simple terms licensing by the state is the issue at bar. Petitioner is already licensed. There has been no discrimination. In his treatment of petitioner the commissioner has acted in the same way he acts with respect to New York residents. The Federal Congress when it acted sought to cooperate with the states on producer price control, and, going no further, did not act in milk dealer licensing matters which are entirely left to the state. Under such circumstances and on such a record it would seem certiorari to this Court would not lie.

The commissioner's determination should be read as a whole. Especial emphasis on individual findings distorts it. If there can be no state license control, then of course there can be no regulation of the number of milk plants operated by a dealer, and Hood would be entitled to unlimited plants in New York. However, if there still is license control by New York then a determination which denies Hood an additional plant because it failed to show a need for one would not seem to be an unsound decision constitutionally. The need is demonstrated by factual proof on the administrative hearing and the burden was on petitioner as applicant.

Wherefore, it is respectfully submitted that the petition of H. P. Hood & Sons, Inc. for a Writ of Certiorari should be denied.

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